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Veera Pandian Bala & Anor v Public Prosecutor

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO K-05–163–06 OF 2015
ZAWAWI SALLEH, VERNON ONG AND ZAMANI A RAHIM JJCA
20 MARCH 2017

C *Evidence — Information leading to fact discovered — Evidence Act 1950, s 27 — Admissibility of statement made by accused — Whether prosecution did not have to prove actual words spoken by accused — Whether s 27 used the word 'information' and not 'statement' — Whether accused's conduct in pointing out place where incriminating item was found admissible under s 8 of Evidence Act 1950 — Whether on totality of evidence accused persons had not raised any reasonable doubt on prosecution's case*

D

The appellants' instant appeal was against their conviction and sentence by the E High Court on a charge under s 3 of the Kidnapping Act 1961 read with s 34 of the Penal Code. Each of the appellants was sentenced to life imprisonment plus ten strokes of whipping. The prosecution's evidence was that several men had abducted a boy while he was on his way home after tuition classes one night in September 2012. Later that night, the boy's father ('SP3') received an F anonymous telephone call asking for RM500,000 for his son's release. SP3 lodged a police report and after negotiating the ransom sum down to RM350,000, he took the money, that had already been marked by the police, to a place where the kidnappers had told him to come. While SP3 was waiting in his car, the first appellant ('A1') appeared, got into SP3's car took the ransom G money and left on a motorcycle. The second appellant ('A2') was using the same motorcycle when he was arrested by police the following day. A2 later led police to a place where part of the ransom money was recovered. Meanwhile, A1 was also arrested and he led police to another place where more of the ransom money was hidden. A2 had raised the defence of alibi saying he was at H home with his father when the abduction took place and that the boy had never identified him as the kidnapper. A2 said the testimony of the police officer who said he had pointed to the place where part of the ransom money was kept was inadmissible under s 27 of the Evidence Act 1950 because the officer had not recorded the actual words he had spoken at the time. A1's defence, on the other I hand, was that he was forced by another person under police remand to commit the crime.

Held, dismissing the appeal and affirming the conviction and sentence:

(1) It was now settled law that information given by an accused person under s 27 of the Evidence Act 1950 need not be the actual words that were spoken by the accused. This was justified on the basis s 27 used the word 'information' and not the word 'statement' which was used in ss 17–31 of the Evidence Act 1950. In any event, s 8 would apply as the conduct of A2 in leading SP8 and his team to the chicken coup was a relevant fact in issue because it led to the recovery of part of the ransom money, which would otherwise not have been recovered. Accordingly, there was no misdirection on the part of the trial judge (see para 16).

(2) As to A2's defence of alibi, the trial judge had not committed any misdirection in law or in fact. A2's arrest was based on the registration number of the motorcycle he was riding which was the same one A1 had used when he came to pick up the ransom money from SP3. In addition, A2 had given information to SP8 as to the place where part of the ransom money was kept. On the totality of the evidence, it was proven that the kidnapping was done by the appellants in furtherance of their common intention (see para 17).

(3) There was no evidence to support A1's defence of duress. A1 never informed the police of that fact promptly after his arrest. No evidence was adduced to show he could not have reasonably extricated himself or sought protection or had a 'safe avenue of escape'. Instead, he carried out the abduction of SP11. He was also arrested at the temple where part of the ransom money was recovered (see para 18).

(4) The defence of the appellants, when tested against the totality of the evidence adduced, was difficult to believe. The defence had failed to raise any reasonable doubt on the prosecution's case. The evidence before the court irresistibly pointed to the guilt of the appellants and their conviction was safe (see para 19).

[Bahasa Malaysia summary

Rayuan perayu ini adalah terhadap sabitan dan hukuman mereka oleh Mahkamah Tinggi atas pertuduhan di bawah s 3 Akta Penculikan 1961 dibaca bersama s 34 Kanun Keseksaan. Setiap perayu telah dihukum penjara seumur hidup dan sepuluh sebatan rotan. Keterangan pendakwaan adalah bahawa beberapa orang lelaki telah menculik seorang budak lelaki semasa dia sedang dalam perjalanan pulang selepas kelas tuisyen pada malam dalam bulan September 2012. Pada malam tersebut, bapa budak lelaki itu ('SP3') telah menerima panggilan telefon yang tidak dikenali meminta RM500,000 untuk pelepasan anak lelakinya. SP3 telah membuat laporan polis dan selepas berunding wang tebusan dikurangkan kepada RM350,000, dia telah mengambil wang itu, yang telahpun ditanda oleh polis, untuk berlaku di mana penculik telah beritahu dia untuk datang. Semasa SP3 sedang menunggu dalam keretanya, perayu pertama ('A1') tiba, masuk ke dalam kereta SP3 untuk

mengambil wang tebusan itu dan telah pergi dengan motorsikal. Perayu kedua ('A2') masih menggunakan motorsikal sama apabila dia ditangkap oleh polis pada hari berikutnya. A2 kemudian telah membawa polis ke tempat di mana sebahagian wang tebusan dijumpai. Manakala, S1 juga telah ditangkap dan dia telah membawa polis ke tempat lain di mana lebihan wang tebusan itu disembunyikan. A2 telah menimbulkan pembelaan alibi mengatakan dia berada di rumah dengan bapanya semasa penculikan berlaku dan bahawa budak lelaki itu tidak pernah mengenal pastinya sebagai penculik itu. A2 mengatakan keterangan pegawai polis yang mengatakan dia telah menunjuk kepada tempat di mana sebahagian wang tebusan itu disimpan adalah tidak boleh diterima di bawah s 27 Akta Keterangan 1950 kerana pegawai itu tidak merekodkan kata-kata sebenar yang diucapkannya pada masa itu. Pembelaan A1, sebaliknya, adalah bahawa dia telah dipaksa oleh seseorang yang lain di bawah reman polis untuk melakukan jenayah.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman:

(1) Ia kini undang-undang tetap bahawa maklumat yang diberikan oleh tertuduh di bawah s 27 Akta Keterangan 1950 tidak perlu kata-kata sebenar yang diucapkan oleh tertuduh. Ini dijustifikasikan berdasarkan s 27 menggunakan perkataan 'information' dan bukan perkataan 'statement' yang digunakan dalam ss 17–31 Akta Keterangan 1950. Dalam apa-apa keadaan, s 8 akan terpakai kerana perlakuan A2 membawa SP8 dan pasukannya ke reban ayam adalah fakta relevan berhubung isu kerana ia membawa kepada penemuan sebahagian wang tebusan, yang mungkin tidak dapati ditemui. Sewajarnya tiada salah arah di pihak hakim perbicaraan (lihat perenggan 16).

(2) Berhubung pembelaan A2, hakim perbicaraan tidak melakukan apa-apa salah arah dari segi undang-undang atau fakta. Tangkapan A2 adalah berdasarkan nombor pendaftaran motorsikal yang ditunggangnya yang sama dengan yang digunakan oleh A1 apabila dia datang untuk mengambil wang tebusan daripada SP3. Tambahan, A2 telah memberikan maklumat kepada SP8 berhubung tempat di mana sebahagian wang tebusan itu disimpan. Berdasarkan keseluruhan keterangan, ia dibuktikan bahawa penculikan itu telah dilakukan oleh perayu-perayu berikutan niat bersama mereka (lihat perenggan 17).

(3) Tiada keterangan untuk meyokong pembelaan A1 untuk ugutan. A1 tidak pernah memberitahu polis berhubung fakta tersebut sejurus selepas tangkapannya. Tiada keterangan dikemukakan untuk menunjukkan dia tidak mungkin boleh membebaskan dirinya dengan munasabah atau meminta perlindungan atau membuat 'safe avenue of escape'. Sebaliknya, dia telah menjalankan penculikan SP11. Dia juga telah ditangkap di kuil di mana sebahagian wang tebusan itu ditemui (lihat perenggan 18).

(4) Pembelaan perayu-perayu, apabila diuji dengan keseluruhan keterangan yang dikemukakan, adalah sukar untuk dipercayai. Pembelaan telah gagal menimbulkan apa-apa keraguan munasabah ke atas kes pendakwaan. Keterangan di hadapan mahkamah dengan jelas menunjuk kepada kebersalahan perayu-perayu dan sabitan mereka adalah selamat (lihat perenggan 19).]

Notes

For cases on Evidence Act 1950, s 27, see 7(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2415–2417.

Cases referred to

Balakrishnan a/l Purushotaman lwn Pendakwa Raya [2012] 2 MLJ 478, CA (refd)
Bhagirath s/o Param and Ors v State of Madhya Pradesh AIR 1959 MP 17, HC (refd)
Chu Tak Fai v PP [1998] 4 MLJ 246, CA (refd)
Hasamuddin bin Talena v PP [2002] 2 MLJ 408; [2002] 2 CLJ 504, CA (refd)
PP v Hashim bin Hanafi [2002] 4 MLJ 176, HC (refd)
Siew Yoke Keong v PP [2013] 3 MLJ 630, FC (refd)
Sum Kum Seng v PP [1981] 1 MLJ 244, FC (refd)

Legislation referred to

Evidence Act 1950 ss 8, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31
Kidnapping Act 1961 s 3
Penal Code s 34

Appeal from: Criminal Trial No 45C-08–02 of 2013 (High Court, Alor Setar)

V Saravanan (Edmund, Saravanan & Babu) for the first appellant.
RSN Rayer (R Nethaji Rayer & Co) for the second appellant.
Jasmee Hameeza (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Vernon Ong JCA:

INTRODUCTION

[1] The first and second appellants were charged for kidnapping under s 3 of the Kidnapping Act 1961 ('Act 365') read with s 34 of the Penal Code ('the PC'). The appellants were convicted and sentenced to imprisonment for life and ten strokes with whipping of ten strokes each. This is their appeal. After hearing of counsel, we dismissed the appeal on 13 December 2016. We now proceed to give our reasons.

A FINDINGS OF THE HIGH COURT

[2] At about 10.30pm, on the night of 25 September 2012, Arun Alagusuntharam a/l Venkatchalam ('SP11') was travelling back home in a car driven by his father's driver after tuition classes when SP11 was forcibly abducted by several men and confined in a drain near Taman Golf, Alor Setar, Kedah.

[3] Later that night, SP11's father ('SP3') received a telephone call from an unidentified person who demanded for a ransom of RM500,000 for the release of his son. Meanwhile, SP3 made a police report on the incident. The following day, after receiving numerous telephone calls asking for the ransom money, SP3 and the kidnappers agreed on the reduced ransom sum of RM350,000 to be handed over in Sungai Petani.

[4] On 27 September 2012, SP3 managed to compile RM350,000 in cash. The notes were counted and their serial numbers recorded by a police officer. As instructed, SP3 brought the ransom money to Central Square Supermarket in Sungai Petani, there he received a telephone call to go to the Stesen Bas Lama Sungai Petani. When he arrived at Stesen Bas Lama Sungai Petani, he was instructed to go to the Stesen Bas Express, Sungai Petani. Whilst there, SP3 waited until about 7.40pm when the first appellant approached SP3's car and knocked on the car window. The first appellant then entered SP3's car. After taking the ransom money, the first appellant exited the car and left on a motorcycle.

[5] The second appellant was arrested on 28 September 2012 by DSP Toh ('SP6') as he was riding a motorcycle in Taman Ria Jaya Sungai Petani. SP6 handed over the second appellant to DSP Hazril ('SP8'). Later, the second appellant led SP6 and his team to a chicken coup where SP8 recovered a portion of the ransom money. SP8 then handed over the second appellant together with the motorcycle, handphone and the money recovered to the investigating officer, ASP Bee ak Amba ('SP13').

[6] The first appellant was arrested by Insp Elankovan ('SP9') at a temple at Jalan Kuala Ketil. SP9 found the first appellant in an area which was under construction. After arresting the first appellant, SP9 examined the empty space between some stones near where the first appellant was arrested and found a plastic package which contained another portion of the ransom money. All the ransom money recovered by SP8 and SP13 are the marked notes.

[7] The learned judge also considered the following circumstantial evidence which incriminated the appellants: (i) Marwarni bt Abdul Rahman's ('SP7') evidence of the DNA obtained from 'swap peluh' from the car that

SP11 was abducted in; and (ii) the finger print evidence lifted from the car driven by SP11 to hand over the ransom money. The learned judge also relied on s 27 of the Evidence Act 1950 in admitting the evidence leading to the recovery of the ransom money based on the information given by the second appellant.

SUBMISSION OF COUNSEL

[8] Learned counsel for the first appellant mounted the defence of duress. He argued that the first appellant was forced and threatened to commit the act by one Intan Maniam. Under cross-examination, SP13 agreed that Supramaniam a/l Rengasamy alias Intan Maniam was remanded for investigations. However, learned counsel conceded that they did not tender Intan Maniam's statement in support of their contention.

[9] Learned counsel for the second appellant advanced two main points. First, he argued that SP8's evidence that the second appellant pointed with his hand towards the place where part of the ransom money was kept is not admissible. He argued that the prosecution failed to record the actual words said by the second appellant as pursuant to the strict requirement of s 27 of the Evidence Act 1950. As such, there was no contemporaneous statement of the second appellant produced in court. In support of his argument, learned counsel cited the Court of Appeal decision in *Hasamuddin bin Talena v Public Prosecutor* [2002] 2 MLJ 408; [2002] 2 CLJ 504. In this connection, learned counsel also argued that: (i) the prosecution also failed to produce other independent evidence to corroborate SP8's testimony; (ii) there was no evidence tendered in court to prove the ownership of the chicken coup in question; and (iii) SP8's evidence on the discovery contradicted the evidence of SP13 the investigation officer.

[10] Secondly, learned counsel argued that the learned judge erred in rejecting the second appellant's defence of alibi. The victim, SP11, only identified the first appellant. The second appellant was never identified. The prosecution failed to adduce any evidence to rebut the alibi evidence of the second appellant and his father that the second appellant was at home when the abduction took place. Further, the driver of the car was not called to testify; instead, he was sent back to India. Evidence suggested that he was complicit in the kidnapping of SP11.

[11] In reply, learned deputy public prosecutor ('DPP') submitted that SP8 had given oral evidence of the words uttered by the second appellant which led to the discovery of part of the ransom money. It is not necessary for the prosecution to prove the actual words uttered by the second appellant (*Public Prosecutor v Hashim bin Hanafi* [2002] 4 MLJ 176; *Balakrishnan a/l*

Purushotaman lwn Pendakwa Raya [2012] 2 MLJ 478; *Siew Yoke Keong v Public Prosecutor* [2013] 3 MLJ 630 (FC)).

[12] Even if s 27 of the Evidence Act 1950 was wrongly applied, SP8's evidence is admissible and relevant under s 8 as it shows the concealment of part of the ransom money by the second appellant; without that evidence, the police would not have been able to recover the money. The fact that the second appellant led SP8 and his team to the chicken coup shows that the second appellant had knowledge of the ransom money buried at the chicken coup.

[13] In reply to the argument on alibi, learned DPP argued that the learned judge did consider the defence of alibi raised by the second appellant. However, the learned judge found that the prosecution's case is that the kidnapping was done by the appellants, in furtherance of the common intention of the appellants; as such, even if the second appellant was not present at the scene of the crime, the fact of the alibi did not raise a doubt on the second appellant's involvement in the kidnapping.

[14] Learned DPP also argued that according to the investigating officer, SP13, the driver of the car was not involved in the kidnapping. The defence did not indicate to the prosecution that they would like to call him as a witness. Even without the driver's evidence, there is the direct evidence of the victim SP11.

[15] Lastly, learned DPP argued that the defence of duress raised by the first appellant does not apply. There was no evidence to show that he was threatened. He did not inform the investigating officer SP13 at the earliest opportunity that he was threatened or coerced by Intan Maniam into committing the crime.

DECISION

[16] We will deal with the point relating to s 27 of the Evidence Act 1950 raised by the second appellant. In our view, this issue has been clearly determined by the Federal Court in *Sum Kum Seng v Public Prosecutor* [1981] 1 MLJ 244 (FC) where the information supplied was that 'the accused admitted burying weapons somewhere and offered to show me the place'. The defence objected to the evidence on the ground that the information must have been the actual words used by the accused. It is now settled law that the information given by an accused person under s 27 need not be in the actual words; this is justified on the basis that s 27 uses the word 'information' and not the word 'statement' which is used in ss 17–31 of the Evidence Act 1950 (*Public Prosecutor v Hashim bin Hanafi*; *Balakrishnan a/l Purushotaman lwn Pendakwa Raya* [2012] 2 MLJ 478; *Siew Yoke Keong v Public Prosecutor* [2013]

3 MLJ 630 (FC); and *Bhagirath s/o Param and Ors v State of Madhya Pradesh* AIR 1959 MP 17). We agree with learned DPP that in any event, s 8 would apply as the conduct of the second appellant in leading SP8 and his team to the chicken coup is a relevant fact in issue because it led to the recovery of part of the ransom money, which would otherwise have not been recovered. Accordingly, we find that there is no misdirection on the part of the learned judge.

[17] As to the second appellant's defence of alibi, we are not persuaded that the learned judge committed any misdirection in law or in fact. The second appellant's arrest was based on the registration number of the motorcycle which was identified as the motorcycle which conveyed the first appellant to the Stesen Bas Express, Sungai Petani on 27 September 2012 where SP3 handed over the ransom money to the first appellant. In addition, the second appellant had given information to SP8 on the temple where part of the ransom money was hidden. On the totality of the evidence, it is proven that the kidnapping of SP11 was done by the appellants in furtherance of their common intention.

[18] We have also considered the first appellants defence of duress. In the first instance, there was no evidence to support the first appellant's contention. We note that the victim's father, SP3, agreed that the first appellant told him that he was under duress and had to follow instructions. However, it is significant that the first appellant did not inform the police of that fact promptly after his arrest. We have perused the appeal record and find that there is no evidence to support the first appellant's assertion. No evidence was adduced to show that he could not reasonably have extricated himself or sought protection or had what has been called a 'safe avenue of escape' (see *Chu Tak Fai v Public Prosecutor* [1998] 4 MLJ 246 (CA)). Instead, the first appellant carried out the abduction of SP11. He was also arrested at the temple where part of the ransom money was recovered.

CONCLUSION

[19] In conclusion, we have considered the defence put up by the appellants. We agree with the learned judge that the defence put up by the appellants, when tested against the totality of the evidence adduced, is difficult to believe. The defence have failed to raise any reasonable doubt on the prosecution case. We are satisfied that the evidence before the court irresistibly points to the guilt of the appellants. We are also satisfied that the conviction is safe.

[20] For the foregoing reasons, we do not find any merits in the issues raised. The appeal was dismissed. The conviction and sentence imposed by the High Court on the appellants are affirmed.

Appeal dismissed; conviction and sentence affirmed.

Reported by Ashok Kumar